United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2141

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. NICHOLAS MYSHOLOWSKY, Petitioner-Appellant, -against- PEOPLE OF THE STATE OF NEW YORK, Respondent-Appellee.	Docket No. 75-2141

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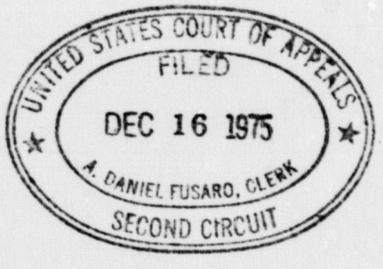
P/S

BRIEF FOR PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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THE UNITED STATES DISTRICT COURT
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QUESTION PRESENTED

Whether the pretrial identification procedures employed in this case were unnecessarily suggestive so as to give rise to a substantial likelihood of misidentification, and thereby denied appellant his right to due process of law.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (The Honorable Mark A. Costantino) entered on June 12, 1975, denying appellant's petition pursuant to 28 U.S.C. §2254 for a writ of habeas corpus to vacate a judgment of the Supreme Court of the State of New York rendered on June 22, 1954.* On November 3, 1975, this Court issued a certificate of probable cause.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, to represent appellant Mysholowsky on his appeal, pursuant to the Criminal Justice Act.

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*In 1969, appellant was released under the supervision of the New York State Parole Board. He is currently serving a seven-year sentence at the Federal Penitentiary at Lewisburg, Pennsylvania, imposed in 1971 pursuant to a judgment of conviction rendered in the United States District Court for the Eastern District of New York (Costantino, D.J.) after a plea of guilty to bank robbery (18 U.S.C. §2113(b)). A New York State parole violation warrant, issued October 11, 1971, and lodged against Mysholowsky at the Federal institution, is still pending.

Procedural Background

On June 22, 1954, after a jury trial in Queens County Court, appellant was convicted of robbery in the first degree, grand larceny in the first degree, and two counts of assault in the second degree. He was sentenced to concurrent terms of no less than fifteen years nor more than thirty years on the robbery conviction, not less than five nor more than ten years on the grand larceny, and not less than two and one-half nor more than five years on the two assault convictions.

The Appellate Division of the State of New York, Second Judicial Department, affirmed the conviction without opinion (1 App.Div.2d 1036 (2d Dept. 1956)). The New York State Court of Appeals denied leave to appeal on September 17, 1956 (Fuld, J.).

Appellant filed his petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the Middle District of Pennsylvania. On May 2, 1975, the petition was transferred to the Eastern District of New York. In the petition, appellant challenged the validity of the pretrial identification procedures, asserting that the unnecessarily suggestiveness of the procedures resulted in a denial of his Fourteenth Amendment rights to due process of law.* On June 12, 1975, Judge

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*This issue was raised not only on direct appeal to the New York State appellate courts, but also in three separate coram nobis petitions.

Costantino denied the petition.*

Statement of Facts

On September 22, 1953, Julia Tully, the bookkeeper at Adams Industries, a company situated in Long Island City, was robbed of the company's $4,800 payroll (38-45**). The robbery occurred at approximately 10:30 a.m. as Mrs. Tully was waiting to get into a freight elevator in the building in which Adams Industries was located (56). The crime was committed by two robbers (59), both of whom successfully escaped from the scene.

The robbery was witnessed by two other persons. One was Mr. Tully who, as was his custom, had driven his wife from the bank where she had picked up the payroll to Adams Industries (294-379). The other witness was Nicholas Santorico, the freight elevator operator (215-292).

On October 22, 1953, one month after the robbery, appellant Nicholas Mysholowsky and John Sadowy were arrested at a construction site on Francis Lewis Boulevard, where they were working together, and charged with the crime (392).

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*The opinion is "B" to appellant's separate appendix.

**Numerals in parentheses refer to pages of the trial transcript, docketed and made part of the record on appeal.

Throughout, both appellant and Sadowy consistently and repeatedly denied their guilt.*

A. Pretrial Identification Procedures**

1. September 22, 1953

During the afternoon of the day of the robbery, Mr. and Mrs. Tully were taken to police headquarters in Manhattan to view photographs in the "Rogues Gallery"*** (63, 364, 386, 496). The pictures are catalogued according to type of crime and height of perpetrators (497). Although appellant's photograph was in the files which were viewed by the Tullys (703), they did not identify him as the robber (129, 364). Instead, sitting together as they went through the files, they discussed the robber's appearance, agreed on a description of his features, and jointly chose

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*Appellant sought, unsuccessfully, to introduce into evidence the results of a polygraph examination which unequivocally concluded that when appellant denied participation in the robbery he was telling the truth (1147-1170). See infra at 20-21.

**The evidence of all the pretrial identification procedures except the lineup was elicited during the trial -- on cross-examination of the three eyewitnesses and on direct examination of the two State detectives assigned to the case. The facts of the lineup (see infra) were revealed in the direct examination of all these witnesses.

***The "Rogues Gallery" is part of the Bureau of Criminal Identification of the New York City Police Department (496).

three photographs of other persons who they thought looked like the robber* (130). Mrs. Tully testified, concerning this procedure:

> ... Well, together we picked out three pictures. We discussed it and we both agreed on what we thought was a similarity.
>
> ... We just said to Detective McCarthy that we didn't find the man there but that this looked something like the shape of the face.
>
> (130).

2. Three Weeks After the Robbery

Approximately three weeks after the crime Detective Robert McCarthy arrived at Mrs. Tully's office and, according to Mrs. Tully, showed her a single photograph of appellant Mysholowsky.** While McCarthy maintained he had shown Mrs. Tully a spread of fifteen to seventeen photographs (505-506), he conceded that when she failed to identify any of

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*In answer to defense counsel's questions concerning whether Mr. and Mrs. Tully had collaborated -- consciously or unconsciously -- in their description of the robber, Mrs. Tully admitted that she had overheard her husband tell the police that the robber was wearing a light green jacket (134). She also conceded:

> ... We had a conversation ourselves about it and he described him to me. I am not sure I heard what he said to the police. I don't want to say.
>
> (135).

**This photograph, Peoples Exhibit #6, was a front and profile shot of appellant (511-512).

them he singled out the picture of appellant and asked the witness if the robber resembled him:*

> When she went through the pile of pictures and was unable to identify any of them, I picked out this picture [Exhibit #6] and showed it to her and said, "Does this look like the person at all?"
>
> (530).

Mrs. Tully studied the picture for three or four minutes and rejected it, concluding that the man pictured was too young to be the robber** (139, 530).

On the same day Nick Santorico, the elevator operator, was apparently shown this same spread of photographs. However, there is no indication that McCarthy singled out appellant's photograph for Santorico, as he had done with Mrs. Tully, and Santorico did not identify appellant's photograph as that of the robber*** (512-513).

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*During the period of time between the robbery and this showup, Mrs. Tully was shown as many as fifty other photographs, always in groups (427). It does not appear from the transcript whether appellant's photograph was included in any of these groups.

**Exhibit #6 was apparently photographed in 1938 (387).

***Without fixing any time for these photographic descriptions, Santorico testified that he had been shown pictures by Detective Bucks, but did not recognize any photographs of appellant (235-237).

3. Three and One-Half Weeks After the Robbery

A few days later Detectives McCarthy and Walter Buchs returned to show Mrs. Tully a more recent photograph* of appellant (391). Both Mrs. Tully and McCarthy remembered that Bucks showed her only one picture** (153, 514). Mrs. Tully looked at the photograph for "five or ten minutes" (156), and this time recognized a similarity between the robber and appellant*** (154). Specifically, Mrs. Tully testified:

> ... I said that I was beginning to feel pretty sure about that picture, but I still would like to see the man.
>
> (155-156).

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*This photograph was marked and introduced into evidence as Peoples Exhibit #5. The photograph was apparently taken in 1952 at the time of appellant's release from prison (1200).

**While Detective Bucks asserted that this picture was part of a spread of five photographs (428), this contention conflicts not only with the testimony of McCarthy and Mrs. Tully, but also with Buch's own assertion that he showed this photograph to Mrs. Tully in a "different fashion" than he had shown it to Santorico. In contrast, Santorico was shown only a spread of pictures (391-392). See infra at 9 .

***Mrs. Tully commented that the man in the photograph was thinner than the man who had committed the robbery (154).

On the same day Bucks showed the picture to Santorico. However, according to Bucks's own testimony, the procedure with Santorico differed from that used in displaying the photograph to Mrs. Tully:

> ... I showed it to Santorico, but I showed it to him in a different fashion than I showed it to Mr. or Mrs. Tully.
>
> ... I gave them [sic] a lot of pictures, and I would say at least twenty at the time, and I said, "Nick," I said, "do any of these pictures mean anything to you?" And he looked them over hurriedly and he said, "No." That was both on the same day that I showed it to Mrs. Tully.
>
> (392). Emphasis added.

4. Two or Three Days Later --

One Day Before the Lineup

Two or three days after Mrs. Tully had been presented with the second photographic showup of appellant, she and Mr. Tully went to the police station so that Mr. Tully could view the pictures (170). Mrs. Tully conceded that on the way to the station house she and her husband discussed her prior identification and that she told him that she had seen a photograph which she thought might be of the robber. Further, Mrs. Tully told her husband that she had some reservation because there was a discrepancy between the weight of the man in this photograph and the robber (171).

When the Tullys arrived at the police station, they were

both shown appellant's picture. According to Detective Buchs, he showed Mrs. Tully a spread of photographs and she volunteered, "[t]his is the picture you showed me the other day. I feel as though that could be the man" (436). In contrast, according to Mr. Tully, when he was shown the spread of photographs, Detective Buchs specifically asked him, "[I]s this the fellow, do you recognize him?" (369). Mr. Tully replied that appellant looked like the robber except that the robber was heavier (369).* Tully also said, according to Buchs, that he recognized appellant's photograph because the robber had gray hair, as did appellant (440). Buchs did not remember whether any of the other photographs he had shown Mr. Tully depicted people with gray hair (440-441). Both Mr. and Mrs. Tully expressed the desire to see appellant in person (369, 370).

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*Both Mr. and Mrs. Tully agreed that, although each of them was shown the spread separately, they were in the same room during the viewing (170, 370) and each heard the other's identification. Mr. Tully heard his wife reiterate that the photograph of appellant depicted the robber except that the robber weighed more (370), and Mrs. Tully overheard her husband remark that the man in the photograph had gray hair, as did the robber (175, 440).

5. The October 22, 1953, Lineup

A day or two following the last photographic display, appellant and John Sadowy were placed in a lineup with three police officers. Appellant maintained that he was the only person in the lineup who had gray hair (921).* Mr. and Mrs. Tully identified appellant as the robber (314).** Mrs. Tully said he was the man whose photograph she had identified two days earlier (183). When asked specifically if she selected appellant because she had recently seen his picture, she responded that she didn't think so; when asked if it were possible that she was influenced by her earlier exposure to the photographs, she admitted that she did not know (185).***

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*None of the three eyewitnesses testified about whether any of the other participants in the lineup had gray hair. The State offered the testimony of Francis P. Bauer, an official with gray hair who allegedly participated in the lineup (1029-1043). However, Bauer's memory of the lineup was so faulty as to seriously undermine his assertion that he was present. For example, he claimed to be the officer who was standing directly to appellant's right in the line, and he remembered that appellant was wearing a hat (1035). Without exception, all the other witnesses testified that appellant was not wearing a hat.

Moreover, in direct conflict with all the other evidence in the case, Bauer asserted that there were only two witnesses -- a man and a woman -- who witnessed the lineup (1039). Specifically, he recalled that the man identified appellant but the woman failed to identify anyone (1041).

**Mr. Tully, the only one of the three witnesses to see the second robber, identified Sadowy as that man (282).

***Mrs. Tully did assert her belief that appellant was the man who held her up: "It was merely a matter of recognizing his face. I saw him and I recognized him again when I saw him" (186).

Mr. Tully testified that appellant's appearance in the line-up was the same, with the exception of the weight variation, as it had been in the photograph (366-367). Specifically, he said of appellant's appearance at the lineup:

> ... [H]e was a little heavier as we described him.
>
> (367). Emphasis added.

Nicholas Santorico's testimony concerning his ability to identify appellant on the day of the lineup was internally inconsistent. Initially, Santorico said that he could not recognize appellant (231),* while subsequenly he said that appellant, who was standing in the middle of the line, was the man who robbed Mrs. Tully (233).

After the lineup, the three witnesses discussed their identifications and all agreed that appellant was the robber (193).

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* Q. Who was with you when you saw Mysholowsky?

A. Do you mean in the room?

Q. In the room.

A. Well, it was men there and I couldn't recognize him there.

(231).

B. The Trial

1. The Prosecution

The trial took place approximately seven months after the robbery. The State's evidence against appellant consisted only of the eyewitness identifications.

Mrs. Tully testified that, as she stood waiting for the freight elevator* to take her up to Adams Industries, a man approached and rang for the elevator (53). Mrs. Tully described the man as approximately five feet, eight to ten inches tall, and weighing approximately 170 to 180 pounds** (85, 122, 159). She remembered that he wore a dark brown straw slouch hat with a brim and a light green poplin jacket (61).

The man entered the elevator and asked to be taken to the second floor (53). Nick Santorico, the elevator operator, told him that the elevator was for freight, not passengers, and started to direct him to the stairs. The man then turned and pointed a gun. According to Mrs. Tully, the man held the gun in his left hand, while using his right hand to hold his coat out as a shield to observation from passersby. The man

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*The elevator was situated in the center of the building, and was visible to the street (52).

**Without success, the defense sought to introduce the Police U.F.#61 form -- the police report of the crime, which indicates that on the day of the robbery one of the witnesses described the robber as 40 to 45 years old and weighing 170 pounds (1062-1071).

ordered both Mrs. Tully and Santorico back into the elevator (54-55). He then directed Mrs. Tully to give him the money she was carrying.* When Mrs. Tully threw the manila envelope at the robber's feet, he switched the gun to his right hand and picked up the money with his left (57). As the robber was escaping and the elevator doors closing, Mrs. Tully noticed that her husband, who had been sitting in their parked car, was being held at gunpoint by a second man (59).

The actual robbery, according to Mrs. Tully, took thirty-eight seconds (200-202).** Mrs. Tully identified appellant as the robber who took the money (53).

Nick Santorico also identified appellant as the robber (221). He testified that the robber was approximately five feet seven inches tall and that he weighed about 180 pounds (247-248). This description was considerably more detailed than the one he had given on the day of the robbery, when he described the robber only as "tall and heavy set" (250). In

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*The testimony establishes that Mrs. Tully was carrying the payroll for Adams Industries, as she did every week, on Friday, at approximately the same time as usual. The only difference between the September 22, 1953, payroll and previous ones, was that this one, which included overtime payments, was for $4,800, almost $2,000 more than usual (37-43). The record is devoid of evidence to establish that appellant or Sadowy had any familiarity with Adams Industries.

**In addition, Mrs. Tully estaimated that the time which elapsed from the point at which the robber pushed the elevator bell and then pulled his gun was approximately forty-six seconds.

addition, Santorico now "recalled" that the robber's eyes were "light colored." However, on further questioning by defense counsel, Santorico admitted that this detail was solely the result of his observation of appellant in the courtroom and not his memory of the robber (248).*

Further, according to Santorico, the robber wore a soft brown hat and a "pablum" jacket. When defense counsel queried if, by "pablum," Santorico meant "poplin," the latter readily agreed (244-245). However, in response to the question of whether he knew what "poplin" meant, Santorico indignantly replied:

> ... Of course I do. The style of the jacket.
>
> Q. Who told you that?
>
> A. Who told me that? Naturally, when you go and buy things like that, they tell you.
>
> * * *
>
> Q. You knew it was a poplin jacket?
>
> A. Yes, because it was a short jacket; that is right.
>
> (244-245).

Santorico categorically denied ever discussing the robber's description with Mrs. Tully or anyone else. Similarly, he denied ever discussing the robber's movements with Mrs. Tully

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*In fact Santorico had originally testified that the robber's eyes were brown, and then changed his testimony after looking at appellant (248-249).

(260-261), although he identically described how the robber held the gun in his left hand, extended his coat with his right, and switched the gun to his right hand so that he could pick up the money (223-225).

John Tully was the third eyewitness. He had driven his wife from the bank to Adams Industries and was waiting in his parked car as Mrs. Tully waited for the elevator (298). Tully saw a man approach the building and enter the elevator (299). Then Tully saw this man push his wife,* but when he tried to go to her aid, he was prevented from doing so by a second man who, at gunpoint, ordered Tully to stay in the car (302). Mr. Tully identified this second man as John Sadowy (302). He testified that Sadowy took his car keys** and then ran to a 1948 light green Buick (312)*** parked fifty feet in front of Tully's car. Immediately thereafter, the man whom Tully had seen push his wife into the elevator got into Tully's

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*Mrs. Tully denied she was pushed, and said only that the robber had touched her shoulder (56).

**Sadowy, according to Tully, then threw the keys into a field.

***Tully's testimony concerning this car was not consistent. On cross-examination, he described it as "bluish green" (357). On the day of the robbery, however, the Police Report U.F.#61 indicates that the car had been described as a 1951, not a 1948, Buick (1071).

The license plate of the car was obscured so that Tully did not see any of the number (356).

car, apparently by mistake, and ordered him to "get going" (307). The error realized, the man left Tully's car* and ran to the Buick, which then fled the scene (309-310). Tully identified appellant as this second man (317).** Immediately after the robbery, Tully described this man as five feet, eight inches tall, weighing about 160 pounds, gray-haired, and wearing a light green jacket and a straw hat (361).

Detective McCarthy testified that after appellant's arrest his house was searched. The search uncovered neither a brown straw hat nor a light green jacket nor a gun (527). In fact, the search produced no evidence introduced against appellant. McCarthy also testified that, from the time of his arrest, appellant had denied his guilt (529).

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*According to Tully this man was not wearing gloves, and he touched the car door both when he entered and when he left the Tully vehicle (368).

**Tully asserted that there was "no question in [his] mind" that appellant was this robber (317).

2. The Defense

Appellant and John Sadowy were represented by the same lawyer. The defense presented police records to establish that, one month after the robbery, at the time of his arrest, appellant weighed 212 pounds (1091).

Appellant, who was thirty-six years old at the time of the trial, testified* in his own behalf (836-938).

Appellant, his mother (939-941), his brother Julius (954-958), and a friend, Michael Danisi (970-974), all testified that appellant was at home on the day of the robbery. These witnesses explained that on the preceding night, September 21, 1953, they were all together at appellant's house (where he lived with his mother and brothers) to celebrate his brother Walter's birthday.** At the party appellant and Michael Danisi decided to go to the Yankees game the following day (881).

The next morning at about 10:30 a.m. Danisi called appellant at his house and spoke to him there to explain that he couldn't go to the game because he had to go to work (973-974).

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*Appellant chose to testify despite the fact that, to do so, he would have to admit that he had previously been convicted of unlawful entry (837), robbery in the second degree (838), and robbery in the first degree (838-839).

**It was the fact of the birthday party which enabled appellant to reconstruct what had occurred the following day, September 22, 1953. It is not surprising that, at the time of his arrest, appellant did not remember what his activities had been on September 22 (862).

Appellant went back to bed and remained there until about 11:30 a.m. He learned later that day, when he read the newspaper, that the Yankees were playing only a night game on September 22, 1953 (926-927). He stayed home until about 4:00 p.m.

John Sadowy* explained that he spent the day of September 22, 1953, caring for his invalid wife and buying a birthday present for his nephew (592). He also testified that his wife owned a 1948 blue Buick which he used on occasion to drive to work (562).

After an extensive offer of proof outside the hearing of the jury as to the legitimacy of the lie detector test and the qualifications of the person who administered the test, the trial judge sustained the prosecutor's objection to the following evidence.

Seven lie detector tests were administered to appellant. He was asked these eight questions, and gave these eight answers:

> For both subjects, each of them was asked:
>
> 1. Do you know who pulled the Adams payroll stickup?
>
> And the answer is "No."

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*Appellant and Sadowy met in prison. They were acquaintances who met occasionally at their union hall. They were not close friends (638-641).

2. Did you [h]ave a gun any time last September?

And actually there, when it was determined that the subjects knew the exact date of the robbery, the specific date was included in the question.

And the answer again was "No."

3. Were you ever at the Adams place on 48th Avenue?

And the response was "No."

Now, in addition to these questions which had been asked of both, the defendant Mysholowsky was asked:

4. Did you pull the stickup on 48th Avenue?

And the answer is "No."

5. Did you ever get into the car with Mr. Tully?

Answer, "No."

6. Did you ever force the elevator man back into the elevator?

Answer, "No."

7. Did you get into the elevator at the Adams plant?

Answer, "No."

8. Did you ring for the elevator at the Adams plant?

The answer again being "No."

(1171-1172).

The electrical reactions in response to the critical questions were not consistently higher than reactions in response to the control questions. This pattern is typical of that obtained from subjects who

are telling the truth.

(1173)

3. Rebuttal

In rebuttal, the State introduced the testimony of Frances Karwoski, the landlady of a boarding house on Franklin Street in Brooklyn (1098). Karwoski testified that she knew John Sadowy as a former boarder and that she remembered that he came to her boarding house on September 22, 1953, at approximately 10:45 a.m. (1099). Sadowy arrived with a friend, one Nicholas Bonacour, who rented the room for the week (1101, 1107). According to Karwoski, Bonacour was "stocky," about five feet, nine inches tall, and had gray hair (1103). At the prosecutor's request, which he made three times, Karwoski looked around the courtroom, but did not see anyone she could identify as Nicholas Bonacour (1106). On cross-examination, she specifically stated that Bonacour was not in the courtroom (1124).

After summations and the judge's charge, the jury began its deliberations.

Five hours later the jury returned to the courtroom to ask that Frances Karwoski's testimony be re-read to them (1329-1330). Deliberations continued another five hours, until 8:47 p.m., when the jury returned its verdict finding both appellant and Sadowy guilty as charged (1331).

C. The Opinion Below

Judge Costantino denied the petition,* holding, in pertinent part:

> This court has examined the record of that trial with specific attention paid to the testimony regarding the identification procedures. It notes that the identifying witnesses had a clear opportunity to see their assailants, and the pretrial inability to identify the pictures of the defendants was attributable to the age of the pictures shown to them. The correctness of the identification procedures was a question for the jury who resolved it against both defendants. The procedures used were not so impermissibly suggestive as to warrant a finding of a constitutional violation. Indeed, it appears that there was nothing incorrect in the police procedures used.
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> (Appendix B at 1-2).

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*Judge Costantino's opinion denying the petition for writ of habeas corpus is "B" to appellant's separate appendix.

ARGUMENT

THE PRETRIAL IDENTIFICATION PROCEDURES EMPLOYED IN THIS CASE WERE UNNECESSARILY SUGGESTIVE SO AS TO GIVE RISE TO A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION, AND THEREBY DENIED APPELLANT HIS RIGHT TO DUE PROCESS OF LAW.

Eyewitness identification testimony has been characterized as the least reliable of all classes of evidence. Wall, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES, 5-8 (1965). The Supreme Court, in United States v. Wade, 388 U.S. 218, 228 (1967), premised its holding on an acknowledgment of the "vagaries of eyewitness identification," citing Mr. Justice Frankfurter's comment on the fallibility of such testimony:

> ... The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established in the records of English and American trials. These instances are recent -- not due to the brutalities of ancient criminal procedure.
>
> United States v. Wade, supra, quoting Frankfurter, THE CASE OF SACCO-VANZETTI, 30 (1927).

See also Foster v. California, 394 U.S. 440 (1969); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967); United States ex rel. Braithwaite v. Manson, Doc. No. 75-2093, slip op. 595 (2d Cir., November 20, 1975).

The State's entire case against appellant in this 1954 trial consisted of the identifications by the three persons

who were eyewitnesses to the robbery.* Direct examination of these witnesses provided in-court identifications of appellant, as well as descriptions of a pretrial lineup at which he had been selected as the robber. On cross-examination by defense counsel and during the prosecutor's direct examination of the two detectives assigned to the case, it was elicited that, prior to the lineup, witnesses to the crime had been involved in extensive photographic identification procedures. Beyond cavil, these pretrial procedures were not only highly suggestive, but also completely unnecessary to effective police work. Julia Tully, the victim of the robbery, participated on three occasions in suggestive procedures involving the use of photographs. Her husband, John Tully, was involved in one suggestive

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*Richard Kuh, former Acting District Attorney for New York County, commented:

> Proof that relies wholly on identifications made by eyewitnesses [is] inherently weak; persons who merely saw a thief or attacker briefly, and under conditions of stress, may -- despite the best of intentions -- too readily be mistaken.

Kuh, Careers in Prosecution Offices, 14 J. Legal Ed. 175, 187 n.21 (1961).

procedure, and communication with his wife* produced other suggestive forces which affected his identification. Each of these identification procedures was independently suggestive. Repeated use of suggestive procedures fixed the photographic images in the minds of the witnesses and produced lineup and in-court identifications which were tainted.

Despite Judge Costantino's summary conclusion below that "there was nothing incorrect in the police procedures," on the record of this case it is clear that the earlier, improper identifications so tainted the witnesses' ability to testify from their memories of the crime that there resulted a "very substantial likelihood of irreparable misidentification," and thereby denied appellant his Fourteenth

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*At the outset of the police investigation, Mr. and Mrs. Tully were encouraged to provide a collective description of the robber and combine their efforts in identifying him. Official approval of this memory merger began on the day of the robbery. At the "Rogues Gallery," Mr. and Mrs. Tully were placed together to view the photographs. Mrs. Tully testified:

> ... Well, together we picked out three pictures. We discussed it and we both agreed on what we thought was a similarity.
>
> (130).

This candid admission of influence on one another makes plain the rationale of the caveat that witnesses must not be allowed to make identifications in each others' presence. See Gilbert v. California, supra, 388 U.S. at 270; Wall, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES, supra, at 83.

Amendment right to due process of law. Neil v. Biggers, 409 U.S. 188, 196 (1972); Foster v. California, supra; Simmons v. United States, 390 U.S. 377, 384 (1968); United States ex rel. Braithwaite v. Manson, supra, slip op. at 606 n.11.

For about three weeks after the robbery, there had been no identification of the perpetrators. At that time, the police called Mrs. Tully and subjected her to a single-photographic showup -- a snapshot of appellant. Whether she was shown only one photograph, as she testified, or whether Detective McCarthy pulled appellant's picture from a spread of photographs after Mrs. Tully failed to identify him, as McCarthy testified, the net effect was to direct Mrs. Tully's attention to appellant as the man the police believed was guilty. A few days after this initial showup, Mrs. Tully was shown a more recent photograph of appellant, one taken in 1952.* According to the testimony of both Mrs. Tully and Detective McCarthy, who was present during the proceeding, this picture was the only one presented to the witness. She studied it for five or ten minutes before concluding that appellant could not be the man. Mrs. Tully's own description of her thought processes is revealing of the effect the showup was having on her identification. Specifically, she testified:

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*The use of this more recent photograph was apparently inspired by Mrs. Tully's appraisal of appellant's first photograph as "too young" to be the robber.

> I said that I was beginning to feel pretty sure about that picture, but I still would like to see the man.
>
> (155-156).

Shortly thereafter, this time in the company of her husband, Mrs. Tully was asked to view a photographic spread which included the same picture she had studied a few days earlier. Not surprisingly, she recognized the photograph of appellant as the one she had been shown previously, and announced this fact within the hearing of her husband.

Consequently, when Mr. Tully viewed the spread, he was equipped with the knowledge that the array contained a picture his wife had twice previously selected as the robber.* Moreover, it appears that appellant's photograph might have been the only one in the spread to depict a person with gray hair, the one salient characteristic Mr. Tully had previously ascribed to the robber. In this context, Detective Bucks's specific questioning directed at appellant's photograph -- "[I]s this the fellow, do you recognize him?" (369) -- cemented Tully's choice of appellant's picture.

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*Mr. Tully also knew from his conversation with his wife earlier that day that her evaluation of the photograph was that it looked like a slimmer version of the robber.

It is no longer open to dispute that the display of one photograph or the singling out of one picture from an otherwise fair spread is an improperly suggestive identification procedure.* Simmons v. United States, supra, 390 U.S. at 383; United States ex rel. Braithwaite v. Manson, supra, slip op. at 601; United States v. Reid, 517 F.2d 953, 966 (2d Cir. 1975); United States ex rel. Gonzalez v. Zelker, 477 F.2d 797, 801 (2d Cir. 1973); cert. denied, 414 U.S. 924 (1974). In fact, the use of a single photograph for purposes of identification is as "grossly suggestive" as a physical showup. Wall, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES, supra, at 74.

Moreover, the use of any photograph with each of the witnesses before the lineup identification was independent error. Corporeal identifications are concededly more reliable than photographic procedures. United States ex rel. Braithwaite v. Manson, supra, slip op. at 606; Wall, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES, supra; Sobel, EYEWITNESS IDENTIFICATION, §45.02 (1972). Once Mrs. Tully had selected appellant's photograph, there was no justification for showing the

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*As though the suggestiveness of such a procedure were not patently obvious, the particular facts of this case establish that the procedure employed here was conducive to making the identification of appellant. This can be seen from the fact that both Tullys were subjected to the suggestive procedures and identified appellant, whereas Nicholas Santorico, exempted from the photographic showup, never identified appellant's photograph and had no memory of seeing his picture in any of the spreads, although appellant's picture was undeniably presented to him.

picture to Santorico and Mr. Tully, not to mention the repetition of the showing to Mrs. Tully before the lineup. After Mrs. Tully's first pictorial identification, the proper procedure would have been to use the lineup to test the identification of the other witnesses. Wall, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES, supra, at 84.

Not only was the pretrial identification procedure impermissibly suggestive, it was unnecessarily so. The police had more than enough time to assemble other photographs for display along with appellant's. The first photographic spread occurred three weeks after the robbery. Compare Simmons v. United States, supra, 390 U.S. at 384-385. Moreover, Detective Buchs testified that during the course of the investigation, he had shown Mrs. Tully no less than fifty photographs of possible suspects. That being the case, the subsequent tactic of displaying appellant's picture alone or singling it out of a spread after the witness failed to choose it simply cannot be justified. Stovall v. Denno, supra, 388 U.S. at 301-302; United States ex rel. Braithwaite v. Manson, supra, slip op. at 601; United States v. Reid, supra, 517 F.2d at 966. In Neil v. Biggers, supra, 409 U.S. at 198, Mr. Justice Powell explained the gravamen of the error:

> ... Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased

> chance of misidentification is gratuitous....

On the facts of this case it is clear that the in-court identifications, as well as the identifications at the lineup,* were fatally tainted by the suggestiveness of the prior photographic procedures. Prior to the identification procedures involving the photographs, the Tullys and Santorico were unable to identify appellant as the robber and were vague in their first descriptions of the robber; as well, there were critical inconsistencies between the information initially given and appellant's physical features. These considerations put the lie to the witnesses' uniform claim at trial, made after the suggestive procedures, that they were "positive" that appellant was the robber.**

On the day of the robbery, both Mr. and Mrs. Tully failed to identify appellant as the robber, despite the fact that his picture was among those they viewed at the "Rogues Gallery." The Tullys' examination of the files was careful and deliberate enough for them to pick the photographs of

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*As to Santorico's lineup identification, there remains the threshold question of whether he recognized appellant at the lineup.

**See United States v. Evans, 484 F.2d 1178 (2d Cir. 1973), where the in-court identification of three positive eyewitnesses subject to suggestive pretrial procedures was subsequently proved to be wrong. United States ex rel. Braithwaite v. Manson, supra, slip op. at 606, n.11; see also Wall, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES, supra, at 11-12, 15-16, for a compilation of cases in which many eyewitnesses, all of whom were positive about their identification, have subsequently been found to be incorrect.

three other persons who they maintained were not the robber but whose features resembled his. It is telling that appellant's photograph -- apparently the one they both later identified -- did not even remind them of the robber at a time when their memories of the crime were the freshest.

That the "Rogues Gallery" contains hundreds of pictures does not minimize the significance of their failure to pick appellant's picture. They did, after all, choose three others. Moreover, the numbers of photographs in the gallery are not generally believed to thwart accurate identification. Wall, in his treatise, describes the rogues gallery as "[o]ne of the most effective police weapons against crime and its successful perpetration." Wall, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES, supra, at 66.

In addition, the Tullys' original description of the robber was that he was about five feet, eight to ten inches tall, weighed 160 to 180 pounds, and was approximately forty to forty-five years old.* Santorico merely described him as "tall and heavy-set." The evidence at trial established that appellant was thirty-five years old and, at the time of his arrest -- one month after the robbery -- he weighed 212 pounds. Clearly, the description of the robber given by the Tullys was substantially different from appellant's description. The description given by Santorico was so vague

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*The age description appears in the police report form #UF61.

and nebulous as to be probative of nothing. United States ex rel. Braithwaite v. Manson, supra, slip op. at 597, 601 n.5.

Wigmore, in THE SCIENCE OF JUDICIAL PROOF, §251 (3d ed. 1937), explains:

> ... [M]ost persons ... have features not sharply distinctive of a few individuals (e.g., simply a large nose, blue eyes), and that most observers receive only the simplest impressions of features expressible in only the loosest language (e.g., large nose, dark hair), it is easy to appreciate how often the items ..., as recorded, may be items common to many individuals, and yet may cause recognition of sameness.

Moreover, when Santorico's initial description is contrasted with the specificity, yet inaccuracy, of his testimony at trial, it becomes apparent that the witness was not testifying from his own memory of the events. This is amply demonstrated by Santorico's testimony that the robber wore a "pablum" jacket. Mrs. Tully had testified that the jacket was made of a light green "poplin" fabric. While Santorico later acknowledged that he had meant "poplin," not "pablum," he went on to describe "poplin" as a style of jacket. Similarly, in his description of the robber's eyes, Santorico admitted that his assertion that they were "light" colored was the product of his view of appellant in the courtroom, and not his memory of the robber.

While this Court is free to consider other evidence in a case in order to counter the claim of likelihood of mis-

identification (United States v. Reid, supra, 517 F.2d at 967; United States ex rel. Gonzalez v. Vincent, supra, 477 F.2d at 803-804), there was absolutely no such evidence in this case. Although the police searched appellant's house immediately after his arrest, they found neither the gun nor any article of clothing similar to what the robber was said to have worn. In fact, the search produced no incriminating evidence at all.

Similarly, no fingerprint evidence was presented, despite John Tully's testimony that the robber, who was not wearing gloves, opened and closed the door of Tully's car.

In contrast, the defense presented an alibi to account for appellant's activities on the day of the robbery.* Quite plausibly, appellant explained that he could reconstruct his actions on September 22, 1953, because he had made plans for that day the night before at his brother's birthday party. Appellant's mother, brother, and friend, Michael Danise, all corroborated the fact that appellant, his plan to go to the baseball game thwarted by Danise, was at home at the time of the robbery.

Significantly, the State's rebuttal evidence, which contradicted Sadowy's alibi, did not implicate appellant in any way. Although Frances Karwoski testified that Sadowy and

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*The defense also attempted to introduce the results of a lie detector test to establish that when appellant denied his participation in the robbery, he was telling the truth.

another "gray-haired" man had come to her boarding house on September 22, 1953, soon after the time of the robbery, she did not identify appellant as the other man. After three unsuccessful attempts to identify Sadowy's companion, Karwoski looked around the courtoom and explicitly asserted that the man was nowhere in the room.*

Because the eyewitness identification in this case was tainted by impermissibly suggestive photographic procedures, the substantial likelihood of misidentification thus created mandates that the petition be granted.

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*While this testimony was actually exculpatory to appellant, that fact may well have been lost to the jury. Karwoski's testimony was devastating to Sadowy, and he and appellant were linked together as the two co-defendants in the case. The connection was cemented by the fact that both men were represented by the same lawyer. Practically, this had the effect of precluding appellant from arguing to the jury that the evidence established Sadowy's guilt with another, and that appellant was therefore innocent.

CONCLUSION

For the foregoing reasons, the order of the District Court must be reversed and the petition granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Dec. 16, 1915

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Sheila Jacobs